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Utah Court of Appeals

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Mr. J. Frederic Voros, Jr.; Attorney General's Office; Attorney for Appellee.

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UTAH APPELLATE COURTS
OCT 19 2005
Lodged

**IN THE COURT OF APPEALS**
**FOR THE STATE OF UTAH**

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| **STATE OF UTAH,** Plaintiff/Appellee, | : | |
| v. | : | |
| | : | **Case No. 20050412-CA** |
| **GREGORY SHANE WAREHAM,** Defendant/Appellant. | : | |

# BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT AND SENTENCE
ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON, JUDGE, PRESIDING.

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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| **GREGORY SHANE WAREHAM** Defendant/Appellant. | : | |

# BRIEF OF APPELLANT

## JURISDICTION

Appellant appeals from the *Amended Judgment and Order of Commitment to Utah State Prison* entered April 25, 2005 (the "**Judgment**"), in this case involving his convictions in the Seventh Judicial District Court for San Juan County, State of Utah, for Aggravated Kidnaping, a first degree felony; Driving Under the Influence of Alcohol and/or Drugs, a third degree felony; Criminal Mischief, a class B misdemeanor; Assault, a class B misdemeanor; Intoxication, a class C misdemeanor; and Open Container in a Vehicle, a class C misdemeanor. A copy of the Judgment is attached hereto as Addendum "A." The Utah Court of Appeals has jurisdiction over this appeal in this matter pursuant to UTAH CODE ANN. §§78-2-2(4) and 77-18a-1(1)(a) (2003) and UT. R. APP. P. 3(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW

**ISSUE #1:** *Did the "reasonable doubt" jury instruction presented at trial correctly state the law?*

**STANDARD OF REVIEW:** Whether a jury instruction correctly states the law is reviewable under a correction of error standard, with no particular deference given to the trial court's ruling. State v. Reyes, 2004 Ut App 8, ¶14, 84 P.3d 841, *citing* State v. Archuleta, 850 P.2d 1232, 1244 (Utah 1993). Determining the propriety of the instructions submitted to the jury presents a question of law, which this Court reviews for correctness. *Id.* at ¶15, *see,* Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993).

**ISSUE #2:** *Did the trial court abuse its discretion in denying Appellant's motion to disqualify his court-appointed counsel, William Benge, based on a conflict of interest pertaining to Benge's previous prosecution of Wareham on a substantively related charge?*

**STANDARD OF REVIEW**: "[T]he proper standard of review for decisions relating to disqualification is abuse of discretion." Houghton v. Utah Dep't of Health, 962 P.2d 53, 61 (Utah 1998). However, "to the extent this Court has a special interest in administering the law governing attorney ethical rules, a trial court's discretion is limited." *Id.*

**ISSUE #3:** *Did the trial court err in failing to continue the trial on the basis that a defense witness had relocated and defendant required more time to locate them for purposes of trial?*

**STANDARD OF REVIEW**: "A trial court's decision to grant a continuance is a matter of discretion, and [this Court] review[s] the decision for abuse of that discretion." State v. Taylor, 2005 UT 40, ¶8, 116 P.3d 360, *citing*, Seel v. Van Der Veur, 971 P.2d 924, 926 (Utah 1998). An abuse of discretion occurs when a trial court denies a continuance and the resulting prejudice affects the substantial rights of the defendant, such that a "review of the record persuades the court that without the error there was 'a reasonable likelihood of a more favorable result for the defendant.'" *Id. citing* State v. Knight, 734 P.2d 913, 919 (Utah 1987) (*quoting* State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984)).

**ISSUE #4:** *Did the trial court err in failing to merge the Assault charge with the Aggravating Kidnaping charge*?

**STANDARD OF REVIEW**: Merger issues present questions of law, which this Court reviews for correctness. State v. Diaz, 2002 UT App 288, ¶10, 55 P.3d 1133, *citing* State v. Finlayson, 2000 UT 10,¶ 6, 994 P.2d 1243.

**ISSUE #5**: *Did the trial court err in denying Wareham's motion for recusal of Judge Anderson by failing to address Wareham's supplemental issues as raised in the motion and, more particularly, based upon Wareham's allegations that Judge Anderson was instructing his staff to throw away motions made by Wareham and sent to the court?*

**STANDARD OF REVIEW**: Whether a trial judge erred by failing to recuse himself or herself presents a question of law which this Court reviews for correctness. State v. Alonzo, 973 P.2d 975, 979 (Utah 1998). When, however, the trial judge complies

with the requirements of UT. R. CRIM. P. 29(c) and (d) and is approved by another judge of the court to proceed with the case or proceeding, the burden shifts to the movant to show actual bias or abuse of discretion. *Id.* at 979, *citing* State v. Neeley, 748 P.2d 1091, 1094-95 (Utah), *cert. denied* 487 U.S. 1220, 108 S.Ct. 2876, 101 L.Ed.2d 911 (1988).

## DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

I UNITED STATES CONSTITUTION, AMENDS. V, VI and XIV.

II. UTAH CONSTITUTION, ART. I §§ 7 and 12.

III. UTAH CODE ANN. §76-1-402(3).

IV. UT. R. PROF. CONDUCT 1.7(a), 1.9(a) and 1.11(a).

V. UT. R. CIV. P. 10(F)

## STATEMENT OF THE CASE

On April 16, 2005, appellant herein, Gregory Shane Wareham ("**Wareham**"), was charged by *Information* with Aggravated Kidnaping, a first degree felony; Aggravated Burglary (Domestic Violence), a first degree felony; Commission of Domestic Violence in the Presence of a Child, a third degree felony; Driving Under the Influence of Alcohol and/or Drugs (with Priors on 11/26/02 and 12/20/95), a third degree felony; Criminal Mischief (Prior Domestic Violence), a third degree felony; Assault (Prior Domestic Violence), a class A misdemeanor; Possession of Drug Paraphernalia, a class B misdemeanor; Driving on Suspended or Revoked Operator's License, a class C misdemeanor; Intoxication, a class C misdemeanor; and Open Container in Vehicle, a class C misdemeanor. R002-R006. On April 29, 2004, Wareham filed his *Affidavit of*

*Indigency*, which was approved by Judge Lyle R. Anderson of the Seventh Judicial District Court in and for San Juan County, State of Utah (the "**trial court**"). R012-R015. At that time, the trial court appointed William L. Schultz ("**Schultz**") to represent Wareham. *Id.*

On May 17, 2004, the matter came for preliminary hearing before the trial court. R0180. In an order signed May 19, 2004, the trial court entered its *Order* holding Wareham to answer to the charges listed in the *Information*, amending the Criminal Mischief and Assault charges to class B misdemeanors. R021. The trial court set the matter for trial to be held September 1st and 2nd, 2004. R029.

On August 18, 2004, Schultz filed a motion to continue the trial on the basis that Wareham's investigator had not been able to contact potential witnesses. R029-R030. The matter was presumably rescheduled to occur on September 29th and 30th, 2004[1]. R037-R042. On or about September 13, 2004, Wareham filed *pro se* his *Motion to Disqualify* (the "**Pro Se Disqualification**"); however, since Wareham was represented by counsel the clerks did not file the document but called it to the attention of the trial court[2]. R053. A review hearing was scheduled and held on September 16, 2004, whereat the trial court vacated the new trial dates since(a) it was unclear whether Schultz could continue to represent Wareham, (b) it was unclear whether the *Motion to Disqualify* could be filed if

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[1] Counsel herein was appointed on appeal in this matter and can only make assumptions as to the proceedings based upon information in the record. Although no order appears in the record granting Schultz's motion to continue, subpoenas issued by Schultz appear directly thereafter in the record indicating these trial dates.

[2] The *Pro Se* Disqualification is absent from the record on appeal.

not signed by Schultz, (c) Schultz had a week-long vacation scheduled in the intervening week, and (d) the trial court believed it must be cautious about taking any action in the event the *Motion to Disqualify* were to be effective as a pleading. R053-R054.

A subsequent review hearing was held October 4, 2004, at which Schultz informed the trial court that, after communicating with the disciplinary counsel at the Utah State Bar, he believed he could continue to represent Wareham. R054. The trial court directed Schultz to file a memorandum setting forth his position on the *Motion to Disqualify*. *Id.* On October 19, 2004, Schultz filed a *Motion to Disqualify*, the *Affidavit of William L. Schultz*, which had an attachment from Wareham titled *Supplement to Rule 29*, and a *Certificate of Good Faith* (collectively, the "**Disqualification Motion**"). R043-R052. A copy of the Disqualification Motion is attached hereto as Addendum "C." In Wareham's supplement to the Disqualification Motion, he raised the issue that Judge Anderson had instructed his staff to throw away motions made by Wareham *pro se* and sent to the trial court. R048 at ¶5. Upon receiving the Disqualification Motion, the trial court entered its *Order*, indicating that Wareham had "showered the court with papers that may or may not be treated as pleadings" and stating that "those that bear a case number have been retained." R054-R055. The *Order* transferred the case to Judge Bryce K Bryner of the Seventh Judicial District Court with selected information from the record for determination on the Disqualification Motion. R053-R057.

During pendency of the Disqualification Motion, on November 4, 2004, Schultz filed a *Petition for Inquiry Into Competency to Proceed and Exhibits* (the "**Competency**

**Petition**") asking the trial court to order a competency evaluation on Wareham. R061-R063. The petition was set for hearing before Judge Anderson on November 15, 2004. R064-R065. The docket indicates that Judge Anderson did not proceed with this hearing since the Disqualification Motion was pending. *See*, Docket, Case No. 041700049, p. 9, entry for 11/15/04.

On December 13, 2005, Judge Bryner entered his *Ruling on Motion to Disqualify*, addressing the issues contained in Schultz's affidavit, but failing to address separate issues raised in Wareham's supplementation to the Disqualification Motion. R073-R076. A copy of the *Ruling on Motion to Disqualify* is attached hereto as Addendum "D." Specifically, Judge Bryner did not address the issue of whether Judge Anderson had instructed his personnel not to file pleadings sent to the trial court directly by Wareham absent a case number. *Id.* On January 10, 2005, Wareham filed a *pro se* motion for speedy resolution, which does not appear in the record. R161[3].

On December 20, 2005, the matter came for hearing on the Competency Petition. *See*, Docket, Case No. 041700049, p. 10, entry 12/20/04. At the hearing, Schultz indicated that he stood behind the Competency Petition and would withdraw as representation of Wareham if Wareham were found to be competent. *Id.* On December 28, 2004, Judge Anderson entered the trial court's *Order Re: Competency Evaluation of Defendant,* ordering the Department of Human Services to examine the defendant with respect to the defendant's competency to stand trial. R077-R085. On January 31, 2005, a

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[3] Wareham raises the fact that his speedy resolution motion has been ignored by the trial court in his motion for a new trial, dated May 3, 2005, which is the cite relied upon here.

subseq ıent hearing was held at which time the evaluation was presented to the trial court and the trial court found Wareham to be competent to stand trial. Docket, Case No. 041700049, p. 11, entry 01/31/05. Schultz filed his motion to withdraw on January 31, 2005. R086-R087.

On February 4, 2005, the trial court granted Schultz's motion to withdraw. R088-R089. On February 10, 2005, William Benge filed his *Appearance of Counsel* on behalf of Wareham in this matter. R093-R094. The trial was rescheduled to April 13th and 14th, 2005. Docket, Case No. 041700049, p. 11, entry 01/31/05.

On April 13, 2005, the matter came for trial, at the onset of which Benge moved for a continuance. R178 at p. 5. Benge based the motion on several factors, to wit: (1) that a crucial witness to the defense, Diana Hacker, was unable to be subpoenaed due to relocation out of state; (2) that Wareham was not satisfied with Benge's representation; (3) that Wareham's competence to stand trial needed revisiting; and (4) that Benge questioned his ability to represent Wareham due to lack of contact. *Id.* at pp. 5-6.

At this time, Wareham informed the trial court that Benge[4] had previously prosecuted him before Judge Anderson's court and that he had a hard time trusting him with his defense. R178 at pp. 7, 19. Wareham requested that the trial court allow him to hire h s own attorney, someone he has confidence in, since he was now employed. *Id.* Wareham informed the trial court he had spoken with two private attorneys respecting his

[4] Benge was the Grand County Attorney through the end of 2002.

representation, and preferred to hire Jerald Heather from Grand Junction, Colorado. *Id.* at p. 11.

When the trial court inquired of Benge respecting the prior prosecution of Wareham, Benge admitted to knowledge of having prosecuted Wareham, but could not remember details about it or what charges it entailed. *Id.* at p. 22. Wareham informed the trial court that Benge prosecuted him in two cases, one for assault and one for DUI, indicating that the DUI charge was before Judge Anderson. *Id.* The prosecutor attempted to get information as to what year these prosecutions occurred, when Judge Anderson interrupted and determined that he would not delay the trial based on the fact that Wareham wanted to hire new counsel. *Id.* at pp. 22-23. Judge Anderson stated that he would possibly have entertained the request earlier in the case, but that it was too late to raise the issue at the onset of trial. *Id.* at 23. Judge Anderson then gave Wareham the choice of proceeding *pro se* or with Benge as his attorney. *Id.* Wareham stated that he did not know how to represent himself, so he had no choice but to proceed with Benge if those were his only options. *Id.* at pp. 23, 25.

Wareham further informed the trial court that Diana Hacker was Wareham and the alleged victim, Jennifer Malaska's ("**Malaska**") next door neighbor and had witnessed both of their behaviors in their tumultuous relationship for years. R178 at p. 13. Diana Hacker was anticipated to be a character witness respecting Malaska's violent nature and prior assaults against Wareham, indicative of Wareham being more of the victim and Malaska more of the aggressor in their relationship. *Id.* Since Wareham had two other

character witnesses subpoenaed and appearing, the trial court determined it would not postpone the trial for Wareham to locate Diana Hacker. *Id.* at p. 15. Since the only factor for the motion to continue was Wareham's competency, which had previously been decided, the trial court denied the continuance and proceeded to trial.

Throughout the two-day trial, Wareham continued to express dissatisfaction with Benge s representation of him, as recognized by the trial court. R179 at p. 74. In the middle of the second day of trial, the trial court dismissed the jury and had a colloquy on the record respecting Wareham's complaints and what evidence Wareham thought Benge should introduce but had not. R179 at pp. 63-77. During this colloquy, Wareham moved for a mistrial on the basis that Benge had failed to call his investigator as a witness, the trial court had failed to continue the matter to allow him to locate Diana Hacker, and that it was a conflict of interest for Benge to be representing him. R0179 at pp. 68-69. The following colloquy then occurred:

> MR. WAREHAM: What evidence was not presented should be presented. The fact that I have not got my – my investigator here. The fact that Mr. Benge has prosecuted me in front of you and before. Now I'm in this court with two prosecutors and a Judge and nobody on my side. There's a very good point.
> THE COURT: Okay. I won't present that to the jury. It's not relevant. Once Mr. Benge quit being a prosecutor two years ago he was open to do defense. And there's nothing about his prosecution of you, which I think must have been about 10 years ago because I can't even remember it – there's nothng about that that would mean that he couldn't –
> MR. WAREHAM: I sure wish it was 10 years ago, because it wouldn't have got me a felony DUI that way.
> THE COURT: How long ago was it then?
> MR. WAREHAM: It had to be after 2000 because me – or '99, because me and her didn't get together till then.
> THE COURT: So you think it was after you got together with Jennifer –

MR. WAREHAM: I know it was.
THE COURT: – that he prosecuted you –
MR. WAREHAM: Yes.
THE COURT: –for a DUI.
MR. WAREHAM: In your court.
. . .
MR. HALLS: I have – I don't know whether the court wants this or not. In the next portion of this is the convictions. You were wondering about them. I just didn't want to sit here knowing what a couple of these were and not indicate to the court what they are.
THE COURT: Why don't you show them to me.
MR. HALLS: This is – I don't know if these were the ones, but the Felony conviction was done by Mz. Morgan, and Mr. Benge was the prosecutor, in a case in 2002. It was a Class-B Misdemeanor. Now those are the two I'm sure of. I do have another – ah, some more criminal history, but –
THE COURT: Okay. It looks like in 2002 defendant was convicted, just at the end of Mr. Benge's term as Grand County Attorney, of a DUI. And the reason why that was in my court is there was also with it, ah, a Class-A Misdemeanor conviction. . .
MR. BENGE: Does that indicate if it happened to be a trial or a plea or – ?
THE COURT: It was a guilty plea.
MR. BENGE: All right. Cause I – I – I honestly don't remember it.
THE COURT: That's why I don't remember it. Apparently it didn't make much impression on me either.

R179 at pp. 68-69, 75-76. The trial court never ruled on the mistrial motion.

At the conclusion of the two-day jury trial, Benge moved to dismiss the charge respecting possession of drug paraphernalia. R179 at p. 99. The trial court granted the motion and this charge was dismissed. *Id.* at p. 102.

At the conclusion of the two-day jury trial, the parties discussed the jury instructions submitted to the trial court. Specifically, Benge requested that Jury Instruction No. 6 have the word "obviate" inserted in it. R179 at p. 95. A copy of Jury Instruction No. 6 is attached hereto as Addendum "B." Jury Instruction No. 6 was then

amended to state that "[t]he State must eliminate (or obviate) all reasonable doubt." R133.

At the conclusion of the trial, the jury deliberated and returned a verdict of guilty on the Aggravated Kidnaping charge, the Driving Under the Influence of Alcohol and/or Drugs charge, the Criminal Mischief charge, the Assault Domestic Violence charge, the Intoxication charge, and the Open Container charge. R179 at pp. 137-138. The trial court then enhanced Wareham's charge prior to sentencing on the DUI to a third degree felony based on two prior convictions on December 3, 2002, and April 20, 2004. R179 at pp. 144-145.

Wareham waived his right to a presentence investigation report and the matter proceeded to sentencing. R179 at pp. 146-147. On April 14, 2005, the trial court sentenced Wareham to a minimum term of 10 years on the Aggravated Kidnaping charge; zero to five years on the enhanced felony DUI charge; six months each in jail on the Criminal Mischief and Assault charges; and 90 days each in jail on the Intoxication and Open Container charges, all to be served concurrently. R179 at pp. 159-160. On April 25, 2005, the trial court entered the Judgment reflecting these matters.

On April 27, 2005, Wareham filed a *pro se* notice of appeal with this Court, which was transferred to the Seventh Judicial District Court in San Juan County, and file-stamped by the trial court on May 2, 2005. R157. On May 11, 2005, Wareham filed a *pro se Motion for a New Trial and etc.* with the trial court. R159-R160. On May 12, 2005, Judge Anderson entered an *Order* denying Wareham's motion for a new trial.

R162-R163. On May 12, 2005, Benge filed a *Notice of Appeal* on Wareham's behalf. R165-R166.

On May 26, 2005, Benge filed a *Motion for Leave to Withdraw as Counsel* based on Wareham's desire to allege Benge's ineffectiveness on appeal. R168-R170. On June 6, 2005, the trial court granted Benge's motion to withdraw. R171. On June 7, 2005, the trial court appointed Joyce G. Smith to represent Wareham on appeal. R176-R177. Shortly thereafter, but not appearing in the record, Joyce G. Smith withdrew from the matter and the trial court appointed counsel herein to represent Wareham on appeal.

## STATEMENT OF FACTS

### A. Malaska's Testimony Respecting the Facts of the Case.

Malaska and Wareham were involved in a relationship and lived together from 1999 to November of 2003. R178 at pp. 86-87. After they ceased living together, they still maintained a relationship seeing each other on occasion. *Id.* at p. 88.

On March 24, 2004, Malaska was living at La Sal and had gone with Wareham to Moab and then went to Monticello to get Wareham a job where they make mining carts. R178 at p. 89. They left Monticello, with Wareham driving, around 3:00 or 4:00 in the afternoon going towards La Sal in anticipation of going on a hike in the hills, but then just ended up going to Malaska's house. *Id.* at pp. 90-91.

On the way to Malaska's house, they stopped at the liquor store, bought a pint of Jagermeister and a bottle of Micky's Bigmouth, and on Lisbon Valley Road Malaska had a couple of shots of Jagermeister and observed Wareham also drink two shots. R178 at

pp. 90-91, 124-125. They had also stopped at the golf course to see if a friend of theirs, Todd McKey, wanted to go drinking and hiking with them. *Id.* at p. 125. Malaska testified that she had not been drinking at that time. *Id.*

Malaska testified that Wareham was getting "drunker and drunker" as the day progressed. R178 at pp. 91-92. Malaska testified that she saw Wareham putting alcohol in a cup and drinking it. *Id.* at p. 93. Malaska testified that Wareham's eyes looked drunk. *Id.* at p. 93.

Malaska and Wareham arrived back at her house around 4:00 p.m. and Wareham made a drink, took a bottle of 100 proof vodka, and went to either Julie Day or Donny Hopkin's house for about an hour. R178 at pp. 94, 132, 138. At about 5:30 or 6:00 p.m., Wareham came back to her house and was drunk. *Id.* at p. 95. Malaska testified that Wareham was walking drunk and looked drunk and was violent and upset with her for a reason of which she was not aware. *Id.* Malaska testified that Wareham was wobbly or unbalanced, had slurred speech and was irritable for no apparent reason. *Id.* At pp. 95-96.

When Wareham came back to her house, he came in and started yelling at Malaska, saying that she was trash like her neighbors, but Malaska was unable to ascertain why he was upset since they had had a good day together. R178 at p. 96. Malaska assumed Wareham had spoken to a neighbor who had upset him. *Id.*

Malaska testified that when Wareham returned from his friend's house, he was "throwing lamps around," screaming at her, acting like he was going to hurt her, breaking her pictures on the walls, breaking lamps and furniture, and ransacking the house. *Id.* at

p. 97. Malaska testified that she felt threatened because she thought that once he was done breaking her things, if that did not get her into "fight mode" with him, that she was next. *Id.* at p. 98. Malaska testified that she felt threatened because she was near things Wareham was breaking, there was glass everywhere, and she had no shoes on. *Id.* at p. 99. Malaska testified that she felt threatened because they "had other violent incidences where [she's] become injured or property has been destroyed or threats have been made on [her] life." *Id.* at p. 100. Malaska admitted to having hit Wareham on those prior occasions, but testified that she was too scared to do so on this occasion because she was caught off guard. *Id.* Malaska testified that she had contacted law enforcement on the prior occasions, but that Wareham always gets out. *Id.* at p. 101.

After breaking things over a short period of time, Wareham left the residence. R178 at pp. 101-102. Malaska then went outside and approached the neighbor to inquire as to why Wareham was so mad, then she got her 12-year-old daughter, went back in the house and locked the door. *Id.* at p. 102. Approximately 30 to 40 minutes later, Wareham came back to the residence. *Id.* at p. 104.

Malaska and her daughter heard Wareham pull up and approach the house. R178 at p. 104. Since the door was locked, he threw a maul and a log through the front window and was screaming at her. *Id.* at pp. 104-105. Malaska testified that she told Wareham that she would unlock the door and she stalled him so her daughter could get out of the house. *Id.* at p. 107. Her daughter climbed out the window and called for help. *Id.*

At that time, Malaska testified Wareham came in and "started punching, kicking, threw [her] down, drug [her] through the grass [sic]." R178 at p. 107. Malaska testified that Wareham first grabbed her in the arms, threw her down, and then punched her in the face, causing her teeth to go through her lip. *Id.* at pp. 108-109. Malaska testified that she recalled being hit five or six times after he threw her on the ground and that he kicked her at least three times in her legs and hip. *Id.* at p. 109.

Malaska testified that Wareham had her by the hair while he was hitting and kicking her, and telling her to get in the truck. R178 at p. 110. Malaska testified that Wareham drug her out to the porch by her hair and her arm through the broken glass. *Id.* at p. 111. Malaska testified that she did not want to go with Wareham because he had "totally thrashed my house for no parent [sic] reason." R178 at p. 110. Malaska testified that she believed he was going to continue hurting her and that the circumstance would not get better unless she obeyed him. *Id.* Malaska testified that she pleaded with Wareham to go away and leave her alone. *Id.* at p. 115. Malaska testified that, once out on the porch, she got up and went to the truck. *Id.* at p. 111. Malaska testified that she did not go with Wareham voluntarily. *Id.* at p. 115. Malaska testified that she did not run to the neighbors because Wareham can outrun her. *Id.* at p. 130. Wareham then threw the birdcage into the back of the truck and they pulled out with the lights off on the truck. *Id.* at p. 112, 119. Malaska testified that it was nighttime and that Wareham was not safely able to operate a vehicle. *Id.* at pp. 118, 120.

Wareham then drove them to a road near Malaska's house that leads to a gravel pit. R178 at p. 113. Wareham drove up the road and then turned around and went by a creek where they could view Malaska's house at the bottom of the hill. *Id.* Malaska testified that, at that time, Wareham said her trip was almost over and that "he was gonna to go to Mexico because if you kill somebody in the United States and you go to Mexico, they won't bring you back." *Id.* Malaska also testified that Wareham said her daughter did not need a mother any more. *Id.* Malaska believed that Wareham was going to kill her that day. *Id.* at p. 116.

Malaska then viewed the police approaching her house at the bottom of the hill and was trying to talk Wareham out of it. R178 at p. 114. Malaska said she told Wareham that she loved him and wanted to go with him and to drop the trailer so the police would see the lights. *Id.* Malaska testified that the police did see the lights and came up to where she and Wareham were. *Id.*

When the police were approaching, Wareham jumped out of the truck and told Malaska to "come on" and Malaska pretended like her door would not open. R178 at p. 116. Malaska indicated that she delayed until the police were close enough to them and she just got out of the truck and ran straight to the police cars. *Id.*

**B. Wareham's Testimony Concerning the Facts of the Case.**

Malaska and Wareham were involved in a relationship and lived together from February of 1999 to March of 2004. R178 at p. 190. Wareham had a camp trailer that he kept at H.E. Beeman's shop in Moab that he would live in during the week and then he

would come home to Malaska's house on the weekends. *Id.* at p. 191. Wareham also would l ve some weekdays at Malaska's if Malaska could give him a ride back in the morning on her way to work. *Id.* at 192.

Malaska and Wareham went to Moab on the morning of March 24, 2004, to transfer property from a trailer he had used at Beeman's shop to both Jennifer's trailer and a camp trailer. R178 at p. 192. While in Moab, they had a conversation with Jay Stocks, during which Jay stated that "the only way Mexico could save you was on a murder charge." *Id.* at p. 210. At approximately 1:00 p.m., they arrived back at La Sal, then w ent on to Monticello to check on a job at Young Machinery. *Id.* at p. 192. Malaska was driving her black Thunderbird. *Id.* at p. 193.

Young Machinery told Wareham he could have a job there, so Malaska and Wareham wanted to celebrate. R178 at p. 193. At approximately 3:00 p.m., they went to the liquor store and bought a fifth-sized bottle of Jagermeister and a six-pack of Micky's Bigmo uths for Malaska. *Id.* Wareham had a beer in the car and a vodka in his truck at La Sal. *Id.* Wareham testified that he had had a mixed drink of vodka and cranberry juice, and Malaska had had a mixed drink of vodka and soda in Moab that morning. *Id.* Wareham also testified that Malaska had had a mixed drink of vodka and cranberry juice in La Sal. *Id.*

After the liquor store, Malaska and Wareham went to the golf course to see Todd McKey. R178 at p. 194. They waited for Todd for approximately one hour while Wareham was welding in the shop down there and Malaska was sitting in the car

"slammin' Jager." *Id.* Wareham testified that "slammin'" meant she was drinking a quarter of a bottle at a drink. *Id.* at p. 195. After a while, Todd came into the shop where Wareham was welding and said that Malaska was laying out there against the car getting slammed and that they needed to get the liquor and get out of there because he works at the golf course. *Id.* at pp. 195-196. Wareham testified that Malaska had already drank two of the Micky's and almost half of the bottle of Jagermeister. *Id.*

Malaska and Wareham got in the car, left the golf course with Wareham driving, and headed to Lisbon Valley turnoff. R178 at p. 197. At the turnoff, they got out of the car to look around and do some point huntin'[5], but it was a cold and miserable day. *Id.* at p. 199. Wareham got scratches all over his legs from the brush where they were point hunting and testified that Malaska's legs were probably scratched by it, too. *Id.* at p. 229. Malaska went back in the car and started drinking again and was sitting in the driver's seat. *Id.* at p. 199. Wareham and Malaska had agreed to go camping, so they went to get the trailer ready to go camping. *Id.* Wareham let Malaska drive from the turnoff because he lets her do what she wants to do since she can beat him up or hurt him. *Id.* at pp. 198, 212-213.

When they arrived at La Sal, Malaska was drunk, so Wareham got her daughter's homework and some clothes and took her to the babysitter, Donny Hopkins. R178 at p. 200. Wareham took her to Donny Hopkins' to see if it was all right if Malaska's daughter could stay there. *Id.* Malaska's daughter had a friend her age at Donny's house. *Id.* at p.

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[5] Wareham testified that point hunting is hunting for arrowheads, dinosaur bones, rocks, etc. R178 at p. 229.

201. Wareham testified that he stayed at Donny's house for about an hour and may have had a beer while he was there. *Id.*

Wareham testified that at around 5:30 p.m. he went back to Malaska's house and started loading water jugs, coolers, and clothes in the camp trailer and was cleaning the trailer out and getting the propane bottles on. R178 at p. 201. At around 6:00 p.m., Wareham sat down to watch television and Malaska went to the neighbor, Julie Day's house. *Id.* Wareham testified that he was laying on the couch at Malaska's house with his arm on his head and his head on the armrest of the couch, when Malaska came in and hit him with a big porcelain lamp over the head and accused him of stealing her Jagermeister. *Id.* at p. 202. Wareham testified that she hollered "You SOB. You stole my Jager." *Id.* at p. 202-203. Wareham testified that he had moved the Jagermeister off the counter into the freezer. *Id.* When Malaska hit him with the lamp, it left a deep cut on his hand that was bleeding a lot and later required 17 stitches, and also a cut on his head which was a scar at the time of trial in this matter. *Id.* Wareham testified that he did not press charges for his injuries because he did not want her to get in trouble and have her daughter taken away. *Id.* at p. 221.

Wareham testified that this act spawned an argument and a fight, so he decided to load his things up and leave. R178 at p. 203. Wareham testified that he had to stop her from hitting him again with what was left of the lamp by grabbing her arms, and that she was "flingin' things." *Id.* Wareham testified that he did throw a bottle of wine at the

floor that he had bought her in Moab and said to her, "You don't need this, you drunken bitch." *Id.* at p. 224.

Wareham testified that Malaska fell down on the floor because she was drunk and thrashing against him and that he did not push her, shove her or kick her like she testified he did. *Id.* at pp. 204, 209. Wareham testified that he did not drag her, that he could not drag her due to the differences in their sizes. *Id.* at p. 209. Wareham testified that Malaska knows how to fight and is very good at it. *Id.* at p. 204. Wareham testified that Malaska knows Judo and is very dangerous. *Id.* at p. 208. Wareham testified that Malaska had successfully assaulted him many times before. *Id.* at p. 204. Wareham testified that he hit Malaska with the back of his hand after she was hitting him. *Id.* at p. 208.

Wareham testified that he had had all he was going to take of it and was going to leave her. *Id.* at p. 203. Wareham told her he was leaving her and this was the last time–that he would never be back with her. *Id.* at p. 209. Wareham grabbed the bird cage and some of his clothes and stuff and was putting it in the truck. *Id.* at p. 204. The maul was in the walkway as Wareham was loading the truck and, in his anger, he threw it too hard toward the porch and missed and hit the window. *Id.* at p. 223. As he was loading the truck, Malaska jumped into the driver's seat, so he got in and they took off. *Id.* at p. 204.

As they were driving, Wareham testified that they were bickering back and forth at each other. R178 at p. 211. Wareham told Malaska that she was not being a very good

mother and that her daughter would be better off in DCFS care with the way she was behaving. *Id.* At no time did Wareham ever say anything to Malaska about killing her. *Id.*

Wareham testified that Malaska[6] drove them to the gravel pit and that Wareham saw the police coming to her house. R178 at p. 205. Wareham assumed one of the neighbors had heard the fighting and called the police, since they had done so before. *Id.* Wareham testified that he told Malaska to stop and that she did stop the vehicle. *Id.* at p. 206. Wareham testified that he thought it was time to stop the chaos and nonsense, so he got out, mixed himself a drink in the back of the truck, opened up the camp trailer and was moving coolers and stuff so he could get to the bed in the camp trailer. *Id.* at pp. 206, R178 at p. 84.

Wareham testified that he was in the camp trailer when Malaska hollered at him that the police were coming. R178 at p. 207. Wareham testified that he determined to stay in the trailer so he could not be charged with DUI, since he was not driving the vehicle. *Id.* When Officer Harris arrived, he told Wareham to get out of the trailer. *Id.* Harris threw Wareham to the ground and arrested him and took him to jail. *Id.*

## SUMMARY OF THE ARGUMENT

The Utah Supreme Court determined in a decision handed down on June 7, 2005, that the element of "obviate all reasonable doubt" in a reasonable doubt jury instruction carried with it the substantial risk of causing a juror to find guilt based on a degree of

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[6] At sentencing, Wareham admitted to having lied about Malaska driving at this point due to the DUI charge, but this evidence was never presented to the jury in this matter.

proof below beyond a reasonable doubt. State v. Reyes, 2005 UT 33, ¶30. With such a risk inherent in the use of the phrase "obviate all reasonable doubt," a juror may have found Wareham guilty under a standard less than that of beyond a reasonable doubt, violating Wareham's due process rights under both the Utah Constitution and United States Constitution. Although not specifically objected to at trial, this Court has previously held that the "[e]xceptional circumstances concept may be employed as basis for reaching issues not properly preserved for appeal, where a change in law or the settled interpretation of law colors the failure to have raised an issue at trial." State ex. rel. T.M., 2003 UT App 191, ¶16, 73 P.3d 959.

The Utah State Bar Ethics Advisory Committee has issued an opinion on the issue at hand, as follows:

> As a general rule, attorney formerly employed by a government agency is not prohibited from representing private client in matters that involve interpretation or application of laws, rules, or ordinances directly pertaining to attorney's employment with the agency. **Attorney may not, however, represent such a client where the representation involves same lawsuit, same issue of fact involving same parties and same situation, or conduct on which attorney participated personally and substantially on behalf of government agency.** In any event, an attorney may not undertake representation adverse to any former client where the matter is substantially factually related to the matter for which the former client retained the attorney's services.

UTAH ST. BAR ETH. OP. NO. 97-08, 1997 WL 433812 (approved July 2, 1997) (emphasis added). Benge prosecuted Wareham on a DUI case in 2002, which was used to enhance Wareham's DUI charge in this matter to a third degree felony. The trial court failed to disqualify Benge on Wareham's express dissatisfaction.

When moving for a continuance, the moving party must show that denial of the motion will prevent the party from obtaining material and admissible evidence, that any additional witnesses it seeks can be produced within a reasonable time, and that it has exercised due diligence in preparing for the case before requesting the continuance. State v. Horton, 848 P.2d 708, 714 (Utah Ct.App.1993). The trial court erroneously denied Warehan's motion for a continuance to obtain new counsel and to locate a witness who had unexpectedly relocated out of state. Each of the criteria of Horton were met.

UTAH CODE ANN. §76-1-402(3) sets forth as follows:

> A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
> (c) It is specifically designated by a statute as a lesser included offense.

*See also*, State v. Wood, 868 P.2d 70, 90 (Utah 1993) (recognizing that the test for determining whether a conviction for two separate offenses violates the Double Jeopardy Clause is essentially the same as that in UTAH CODE ANN. §76--402(3)); State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990)(recognizing that convictions for both a greater and a lesser included offense would violate both the Double Jeopardy Clause and UTAH CODE ANN. §76--402(3)). "[W]here the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot

be convicted or punished for both." Smith at ¶ 8 *citing* State v. Hill, 674 P.2d 96, 97 (Utah 1983) (*quoting* State v. Baker, 671 P.2d 152, 156 (Utah 1983)). Wareham was convicted of both Aggravated Kidnaping and the lesser-included offense of Assault, in violation of the Double Jeopardy Clause and UTAH CODE ANN. §76--402(3).

UT. R. CIV. P. 10 (2002) sets forth the rule pertaining to the form of pleadings and other papers to be filed with the courts in the State of Utah, and specifically states as follows:

> (f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, **the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers.** The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(Emphasis added). With respect to this subparagraph (f), the Advisory Committee Notes to Rule 10 indicate that "[t]he changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule. . ." Judge Anderson indicated in an order that he was retaining only those papers of Wareham's directed to the trial court that bore a case number. Significant *pro se* motions are absent from the record on appeal due to this practice in violation of Rule 10(f). Although raised in the Disqualification Motion, neither Judge Anderson nor Judge Bryner addressed the issue.

## ARGUMENT

### I. THE REASONABLE DOUBT JURY INSTRUCTION FAILED TO ACCURATELY STATE THE LAW

No person accused in the United States may be convicted of a crime unless each element of the offense has been proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (emphasis added). The United States Supreme Court has assigned this standard of proof constitutional status, linking it to both the Fifth Amendment right to due process of law and the Sixth Amendment right to a jury trial. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S. at 362, 364. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364, 90 S.Ct. at 1073, 25 L.Ed.2d 368 (1970).

The Utah Supreme Court has recently overturned its holding in State v. Robertson, 932 P.2d 1219 (Utah 1997) setting forth a three-part test for determining whether a reasonable doubt jury instruction was improper. State v. Reyes, 2005 UT 33, ¶1. The first part of Robertson required the instruction to indicate that the State must "obviate all reasonable doubt." The original concept of this prong appeared "...to derive from a fear that in ascertaining the conviction of the truth of a charge against a defendant, a juror might misapply the 'beyond a reasonable doubt' standard unless she is required to search out, confront, and defeat reasonable doubt with evidence." Reyes at ¶25.

The Utah Supreme Court revisited this prong in Reyes and determined to abandon it based on the fact that the element of "obviate all reasonable doubt" carried with it the substantial risk of causing a juror to find guilt based on a degree of proof below beyond a reasonable doubt. Reyes at ¶30. The Utah Supreme Court undertook the following analysis:

> ¶ 25 The court of appeals found merit in Mr. Reyes's claim that the trial court erred when it failed to expressly instruct that the State's proof must "obviate all reasonable doubt" as mandated by *Robertson. Id.* at ¶ 19. The "obviate all reasonable doubt" test found life in Justice Stewart's dissent in State v. Ireland, 773 P.2d 1375, 1380-82 (Utah 1989) (Stewart, J., dissenting). There, Justice Stewart took issue with an instruction that equated "beyond a reasonable doubt" with "an abiding conviction of the truth of the charge." *Id.* He reasoned that since the standard to be applied is "beyond a reasonable doubt," it followed that any definition of the standard must reference the obstacle--reasonable doubt--to be overcome by the evidence, and must convey the principle that the State must surmount the obstacle of reasonable doubt to justify a conviction. *Id.* The "obviate all reasonable doubt" concept appears to derive from a fear that in ascertaining the conviction of the truth of a charge against a defendant, a juror might misapply the "beyond a reasonable doubt" standard unless she is required to search out, confront, and defeat reasonable doubt with evidence.¶ 26 Insightful and important as Justice Stewart's image of "beyond a reasonable doubt" may be, his suggestion that the jury be instructed to "obviate all reasonable doubt" is both linguistically opaque and conceptually suspect. Not every jury will confront evidence in its deliberations sufficient to create a reasonable doubt. The notion of "obviating" doubt is cumbersome at best where proof is scant or lacking in credibility. In these instances, a description of "beyond a reasonable doubt" that asks jurors to rate the magnitude of their conviction concerning the strength of the evidence imparts a more accurate and useful concept of "beyond a reasonable doubt" than does a construct that requires jurors to identify doubts and assess whether the evidence overcomes them. A universal application of the notion that the State must "obviate all reasonable doubt" can be achieved only by tying it to the concept of the presumption of innocence. If innocence is thought of as an array of inchoate reasonable doubts that the State must overcome to attain a conviction, it follows that the State must "obviate reasonable doubts" in every case. We do not, however, endorse this

unwieldy view of the presumption of innocence.¶ 27 The process suggested by the "obviate all reasonable doubt" standard is also flawed because, contrary to its purpose, it tends to diminish the degree of proof necessary to convict and in that respect violates the *Victor* standard. The "obviation" of doubt contemplates a two-step undertaking: the identification of the doubt and a testing of the validity of the doubt against the evidence. This process suggests a back and forth disputation of a doubt's merits, all to the end of determining whether the evidence is sufficient to "obviate" the doubt. The "beyond a reasonable doubt" standard does not, however, condition a conclusion that a doubt is reasonable on an ability either to articulate the doubt or to state a reason for it. An unarticulated conviction that the State has failed to meet its burden of proof will serve as a legitimate basis to acquit. *3 ¶ 28 To the extent that the *Robertson* "obviate" test would permit the State to argue that it need only obviate doubts that are sufficiently defined, the test works to improperly diminish the State's burden. Writing in the Notre Dame Law Review, Professor Steve Sheppard criticized the expanding prominence of the requirement that doubts be articulated. Steve Sheppard, The *Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 Notre Dame L.Rev. 1165 (2003).* Professor Sheppard summarized the central vice of this trend this way:

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to "give a reason," an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

*Id.* at 1213.

¶ 29 Central to our reconsideration of the merits of the "obviate all reasonable doubt" element of *Robertson* is our belief that the exacting demands of the "beyond a reasonable doubt" standard can be clearly and fairly communicated through an affirmative description of the degree of conviction that must be attained by a juror based on the evidence. We see little to be gained by including within a "beyond a reasonable doubt" instruction the potentially confusing concept that every defendant is entitled to a presumption of reasonable doubt, which the State's evidence must obviate. ¶ 30 Because we conclude that "the obviate all reasonable doubt" element of the *Robertson* test carries with it the substantial risk of causing a juror to find guilt based on a degree of proof below beyond a reasonable doubt, we expressly abandon it.

Reyes at ¶¶24-30.

In the instant matter, the "reasonable doubt" jury instruction expressly indicates that "[t]he State must eliminate (or obviate) all reasonable doubt" which is substantively the same as the prong in Robertson requiring the jury instruction to contain this language. R133. As indicated by the Utah Supreme Court, this instruction carries with it the substantial risk that a juror found Wareham guilty based on a degree of proof below beyond a reasonable doubt. With such a risk inherent in the use of the phrase "[t]he State must eliminate (or obviate) all reasonable doubt," a juror may have found Wareham guilty under a standard less than that of beyond a reasonable doubt, violating Wareham's due process rights under both the Utah Constitution and United States Constitution.

While this issue surrounding the reasonable doubt jury instruction was not preserved by trial counsel at the trial in this matter, this Court should review the matter based upon exceptional circumstances. This Court has previously held that the "[e]xceptional circumstances concept may be employed as basis for reaching issues not properly preserved for appeal, where a change in law or the settled interpretation of law colors the failure to have raised an issue at trial." State ex. rel. T.M., 2003 UT App 191, ¶16, 73 P.3d 959. The original decision was handed down by this Court in State v. Reyes on January 15, 2004, upholding the three-part test in Robertson, and the prong requiring the use of the language "obviate all reasonable doubt." 2004 UT App 8, 84 P.3d 84. Review was granted by the Utah Supreme Court in that matter in May of 2004. The trial in the instant matter was held April 13th and 14th, 2005, while review of Reyes was

pending. The *Opinion* by the Utah Supreme Court in State v. Reyes, abandoning the three-part test in Robertson was handed down on June 7, 2005. It is clear that this change in law, overturning an eight (8) year precedent in Robertson was clearly an unsettled interpretation of the law that colored the ability of Wareham's trial counsel to raise the issue surrounding the reasonable doubt jury instruction.

## II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WAREHAM'S MOTION TO DISQUALIFY HIS COURT-APPOINTED COUNSEL

UT. R. PROF. CONDUCT 1.7 states, in pertinent part, that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents after consultation." UT. R. PROF. CONDUCT 1.9 states, in pertinent part, that "[a] lawyer who has formerly represented a client in a matter shall not thereafter: (a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." UT. R. PROF. CONDUCT 1.11 states, in pertinent part, that "[e]xcept as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. . ." The Utah State Bar Ethics Advisory Committee has issued an opinion on the issue at hand, as follows:

> As a general rule, attorney formerly employed by a government agency is not prohibited from representing private client in matters that involve interpretation or application of laws, rules, or ordinances directly pertaining to attorney's employment with the agency. **Attorney may not, however, represent such a client where the representation involves same lawsuit, same issue of fact involving same parties and same situation, or conduct on which attorney participated personally and substantially on behalf of government agency.** In any event, an attorney may not undertake representation adverse to any former client where the matter is substantially factually related to the matter for which the former client retained the attorney's services.

UTAH ST. BAR ETH. OP. NO. 97-08, 1997 WL 433812 (approved July 2, 1997) (emphasis added).

William Benge was the Grand County Prosecutor until he left office at the end of 2002. On December 3, 2002, William Benge prosecuted Wareham on a class B misdemeanor charge of Driving Under the Influence of Alcohol and/or Drugs. This prior conviction was used in the case herein to enhance Wareham's current DUI charge to a third degree felony. As will be shown below, the trial court first failed to adequately investigate Wareham's claims of conflict of interest at the onset of trial, forcing him to proceed to trial in violation of his Sixth Amendment Rights. Second, the trial court had no discretion to determine whether Benge should have been disqualified for his materially adverse role in the prior conviction, and its determination not to disqualify Benge effectively violated Wareham's Sixth Amendment rights and his Due Process Rights to a fair trial.

### A. The Trial Court Failed to Adequately Investigate Wareham's Complaints Respecting his Court-Appointed Counsel Prior to Commencing Trial.

This Court has long held as follows with respect to a criminal defendant's express dissatisfaction with court-appointed counsel:

> Upon indigent defendant's expression of dissatisfaction with court-appointed counsel, even if trial court suspects that defendant's requests are disingenuous and designed solely to manipulate judicial process and to delay trial, trial court must make some reasonable, nonsuggestive effort to determine nature of defendant's complaints and to apprise itself of facts necessary to determine whether defendant's relationship with appointed attorney has deteriorated to point that sound discretion requires substitution or even to such extent that defendant's Sixth Amendment right to counsel would be violated but for substitution.

State v. Pursifell, 746 P.2d 270, 273 (Utah App. 1987). Perfunctory questioning is not sufficient. *Id., citing* United States v. Welty, 674 F.2d 185, 187 (3rd Cir. 1982).

At the onset of trial, Benge requested a continuance on Wareham's behalf, citing Wareham's dissatisfaction with his representation as one of the factors necessitating such an action. R178 at p. 5. While Benge focused his discussion of this factor on his inability to prepare for trial and call witnesses on Wareham's behalf due to lack of contact, Wareham's first and foremost complaint was that Benge had prosecuted him before Judge Anderson before. *Id.* at p. 7.

Wareham specifically articulated to the trial court that, based upon Benge's prior prosecution of him, he had a hard time trusting Benge in his defense. R178 at p. 7. Wareham had taken measures to retain his own counsel based on his mistrust of Benge

and desire not to have Benge represent him. *Id.* at p. 11. Wareham specifically stated to the trial court "I would like to hire my own attorney. Not someone who's prosecuted me before. Someone that I feel confident in." *Id.* at p. 19.

While the trial court engaged in a lengthy colloquy respecting the contact, or lack thereof, between Benge and Wareham, the entire effort to determine the nature of Wareham's complaints relating to Benge's prior prosecution of Wareham was as follows:

> THE COURT: Did you prosecute Mr. Wareham?
> MR. BENGE: Yes.
> THE COURT: What was the issue?
> MR. BENGE: I don't recall. I honestly don't recall what it was for. Shane may remember.
> THE COURT: I don't remember any, ah –
> MR. BENGE: I don't know if it was in Justice Court or in your court or –
> THE COURT: What was it for, Mr. Wareham?
> MR. WAREHAM: It was two cases. He's prosecuted me for assault and a DUI.
> THE COURT: In my court?
> MR. WAREHAM: The DUI was in my [sic] court.
> THE COURT: Because it was higher than a Class-B Misdemeanor?
> MR. WAREHAM: I assume so. I know it was – it was your court because 7th District.
> THE COURT: I – I usually don't get the DUI's. Did you have somebody in the vehicle who was under 16? Or did you have an accident? Or –
> MR. WAREHAM: No.
> THE COURT: – you had so many that it was a Felony?
> MR. HALLS: What year was it?
> MR. WAREHAM: Ninty [sic] --
> THE COURT: Okay. I'm ready to decide here.

R178 at pp. 22-23. The trial court denied Wareham's request for new counsel directly following this colloquy and proceeded to trial, giving Wareham the choice to do so either with Benge as his attorney or *pro se*. *Id.* at pp. 23, 25.

The trial court was under obligation ". . .to apprise itself of facts necessary to determine whether defendant's relationship with appointed attorney has deteriorated to point that sound discretion requires substitution or even to such extent that defendant's Sixth Amendment right to counsel would be violated but for substitution." Pursifell at 273. A simple check into Defendant's criminal history would have revealed, as it did at the conclusion of trial[7], that Benge had a substantially adverse role to Wareham as it related to the charges herein in that he had prosecuted him on a charge used to enhance one of the current charges. Had the trial court properly inquired as to this factor of Wareham's complaints respecting his counsel, it would have recognized the inherent conflict of interest of Benge representing Wareham and would have discharged Benge from further representation. *See*, UT. R. PROF. CONDUCT 1.7(a), 1.9(a) and 1.11(a); Utah St. Bar Eth. Op. No. 97-08, 1997 WL 433812 (approved July 2, 1997).

"Forcing [an] indigent defendant to stand trial with assistance of attorney with whom he has become embroiled in irreconcilable conflict violates defendant's Sixth Amendment right to effective assistance of counsel." Pursifell at 274, *citing* Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir.1970); *see* United States v. Hart, 557 F.2d 162, 163 (8th Cir ), *cert. denied,* 434 U.S. 906, 98 S.Ct. 305, 54 L.Ed.2d 193 (1977). As it were, the trial court's failure to conduct the appropriate inquiry at the onset of trial necessarily violated Wareham's constitutional right to the effective assistance of counsel, in that he

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[7] R179 at pp. 68-69, 75-76, as more particularly set forth *supra* under the "Statement of the Case" section of this brief.

was forced to proceed to trial with an attorney who maintained an inherent conflict in representing him. UNITED STATES CONST. AMEND. VI.

### B. The Trial Court Had No Discretion to Allow a Violation of Wareham's Sixth Amendment Rights.

This Court previously held that "courts have no discretion to allow a violation of the Sixth Amendment. Substitution of counsel is mandatory when the defendant has demonstrated good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with his or her attorney." Pursifell at 274, *citing* United States v. Welty, 674 F.2d 185, 188 (3d Cir.1982); McKee v. Harris, 649 F.2d 927, 931 (2d Cir.1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982).

As demonstrated *supra*, substitution was mandatory in this matter. The Rules of Professional Conduct only allow Benge to continue representing Wareham upon Wareham's consent. *See*, UT. R. PROF. CONDUCT 1.7(a), 1.9(a) and 1.11(a). Wareham was obviously adverse to providing such consent in this matter based on his articulated position that he did not trust Benge with his defense due to the prior prosecutions. The trial court had this information at the onset of trial. A demonstration of a conflict of interest, as found in the Rules of Professional Conduct, renders substitution mandatory by the trial court. The trial court erroneously exercised discretion it lacked in denying Wareham's request to disqualify Benge and hire a private attorney for his representation in this matter, since taking such action was a direct violation of Wareham's Sixth Amendment rights.

## III. THE TRIAL COURT ERRED IN DENYING WAREHAM A CONTINUANCE TO OBTAIN NEW COUNSEL AND LOCATE DEFENSE WITNESSES

When moving for a continuance, the moving party must show that denial of the motion will prevent the party from obtaining material and admissible evidence, that any additional witnesses it seeks can be produced within a reasonable time, and that it has exercised due diligence in preparing for the case before requesting the continuance. State v. Horton, 848 P.2d 708, 714 (Utah Ct.App.1993). "A trial court's decision to grant a continuance is a matter of discretion, and [this Court] review[s] the decision for abuse of that discretion." State v. Taylor, 2005 UT 40, ¶8, 116 P.3d 360, *citing*, Seel v. Van Der Veur, 971 P.2d 924, 926 (Utah 1998). An abuse of discretion occurs when a trial court denies a continuance and the resulting prejudice affects the substantial rights of the defendant, such that a "review of the record persuades the court that without the error there was 'a reasonable likelihood of a more favorable result for the defendant.'" *Id. citing* State v. Knight, 734 P.2d 913, 919 (Utah 1987) (*quoting* State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984)).

On April 13, 2005, the instant matter came for trial, at the onset of which Benge moved for a continuance. R178 at p. 5. Benge based the motion on several factors, to wit: (1) that a crucial witness to the defense, Diana Hacker, was unable to be subpoenaed due to relocation out of state; (2) that Wareham was not satisfied with Benge's representation; (3) that Wareham's competence to stand trial needed revisiting; and (4) that Benge questioned his ability to represent Wareham due to lack of contact. *Id.* at pp.

5-6. Wareham added an additional factor when he specifically addressed the trial court; namely, that Benge had previously prosecuted him on a DUI charge before Judge Anderson and Wareham desired to retain private counsel for further representation. *Id.* at pp. 7, 11, 19, 22-23.

As argued *supra*, the trial court should have first disqualified Benge from further representation and allowed a continuance for Wareham to retain private counsel as he desired. This continuance would have allowed Wareham the ability to subpoena the witnesses he had either been unable to locate or that Benge had failed to subpoena on his behalf besides obtaining the new counsel he desired to retain. Absent that recognition of the conflict of interest that had arisen, the trial court instead inquired as to the materiality of the witnesses whom Wareham desired to be in attendance.

Diana Hacker was articulated to be a long-term character witness of Malaska, having lived next door to her and Wareham for years. Benge stated that the subpoena had just recently come back and he had received information that Hacker relocated out of state. The trial court substituted two other character witnesses for the material evidence Hacker could have provided and determined not to continue on that basis. This was error, however, in the fact that the Joneses, whom Judge Anderson had substituted for Hacker's perceived testimony were only able to testify as to one instance of violence where Wareham was assaulted by Malaska. Wareham proffered that Hacker would have been able to testify to an established pattern of behavior by Malaska over years. Diane Hacker was not just a character witness, but a credibility witness. This difference could have

impacted the jury's determination in this matter where this matter is a he said/she said type of case. Hence, denial of a continuance prevented Wareham from obtaining material and admissible evidence.

Information was presented to the trial court that Diana Hacker could be produced within a reasonable time, since information on the fact that she had relocated out of state was provided to Benge by Deputy Hines. R178 at p. 5. It can be presumed that Deputy Hines was the process server and was equipped with the contact name of the individual who had provided that information to him and that they may have a location for her. Absent a continuance, however, Benge was not allowed to further investigate the matter to try and locate and produce Hacker as a witness on Wareham's behalf.

Information was also provided that the defense had exercised due diligence in preparing for the case before requesting the continuance on this basis. Benge informed the trial court that he had issued a subpoena for Diana Hacker about two weeks prior to the trial date and that it had just recently been returned as failed to serve based upon relocation. R178 at p. 5. This was not a case where procrastination played any part. Absent a continuance, however, Wareham was not able to follow up on the failed attempt at serving Hacker.

Wareham showed at the onset of trial that denial of the motion would prevent him from obtaining material and admissible evidence in the form of Hacker's testimony, that Hacker could be produced within a reasonable time, and that Wareham exercised due diligence in preparing for the case before requesting the continuance. State v. Horton, 848

P.2d 708, 714 (Utah Ct.App.1993). The trial court erred in granting the continuance either on the basis of obtaining new counsel or to locate a crucial witness who had relocated out of state. Given her testimony as to Malaska's credibility and character in a case where it is Malaska's word against Wareham's word, it is clear that a continuance could have yielded a more favorable result for Wareham.

## IV. THE TRIAL COURT ERRED IN FAILING TO MERGE THE ASSAULT CHARGE WITH THE AGGRAVATED KIDNAPING CHARGE

As this Court observed, in its origin, " '[m]erger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute.' " State v. Smith, 2005 UT 57, ¶ 7, – P.3d –, *citing* State v. Smith, 2003 UT App 52, ¶ 19, 65 P.3d 648 (*quoting* State v. Diaz, 2002 UT App 288, ¶ 17, 55 P.3d 1131). The motivating principle behind the merger doctrine is to prevent violations of constitutional double jeopardy protection. *Id. citing* State v. Lopez, 2004 UT App 410, ¶ 8, 103 P.3d 153 ("Courts apply the merger doctrine as one means of alleviating the concern of double jeopardy that a defendant should not be punished twice for the same crime."); *see also* Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) ("[T]he [Double Jeopardy Clause] forbids successive prosecution and cumulative punishment for a greater and lesser included offense."). Codifying this doctrine, UTAH CODE ANN. §76-1-402(3) sets forth as follows:

> A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included

offense. An offense is so included when:
(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
(c) It is specifically designated by a statute as a lesser included offense.

*See also,* State v. Wood, 868 P.2d 70, 90 (Utah 1993) (recognizing that the test for determining whether a conviction for two separate offenses violates the Double Jeopardy Clause is essentially the same as that in UTAH CODE ANN. §76--402(3)); State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990)(recognizing that convictions for both a greater and a lesser included offense would violate both the Double Jeopardy Clause and UTAH CODE ANN. §76--402(3)). "[W]here the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." Smith at ¶ 8 *citing* State v. Hill, 674 P.2d 96, 97 (Utah 1983) (*quoting* State v. Baker, 671 P.2d 152, 156 (Utah 1983)).

In Hill, the Utah Supreme Court set forth a two-part test for determining whether a conviction for a second offense arising out of the same set of facts violates UTAH CODE ANN. §76-1-402(3), requiring a comparison of "the statutory elements of the two crimes [first] as a theoretical matter and [second], where necessary, by reference to the facts proved at trial." Hill at 97. The pertinent statutory elements of Aggravated kidnaping are as follows:

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:
(a) possesses, uses, or threatens to use a dangerous weapon as defined in

> Section 76-1-601; or
> (b) acts with intent:
> . . .
> (iv) to inflict bodily injury on or to terrorize the victim or another;. . .

UTAH CODE ANN. §76-5-302. The statutory elements of Assault are as follows:

> (1) Assault is:
> (a) an attempt, with unlawful force or violence, to do bodily injury to another;
> (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

UTAH CODE ANN. §76-5-102. It is clear that the Assault charge is a lesser-included offense of the Aggravated Kidnaping charge in that Assault requires a showing of an attempt, threat or act, committed with unlawful force or violence that causes bodily injury to another, while the Aggravated Kidnaping charge requires those same elements to be shown in the course of the actor committing an unlawful detention or kidnaping. *Compare*, UTAH CODE ANN. §76-5-302(1) with UTAH CODE ANN. §76-5-102(1). The first prong of the Hill test is obviously met here.

As compared to the facts proven at trial in this matter, the second prong of the Hill test is also met. Hill at 97. The facts found to be credible and relied upon by the jury in their deliberations and determinations of guilt on the Assault and Aggravated Kidnaping charges surround Malaska's testimony concerning what happened on the day at issue herein, as set forth more particularly above under the heading "Statement of Facts." Any alleged attempt, threat, or act with unlawful force or violence to do bodily injury occurred at Malaska's residence and in the truck on the way to the gravel pit,

which attempts, threats or acts were also in the course of committing the alleged unlawful detainer or kidnaping. There were no separate acts occurring by which to charge Wareham separately for assault and aggravated kidnaping. Thus, the second prong of the Hill test is met and Wareham was entitled to a merger of the Assault charge into the Aggravated Kidnaping charge.

Absent the trial court's recognition that these charges should be merged, Wareham's convictions for both violated both the Double Jeopardy Clause of the Utah and United States Constitutions and UTAH CODE ANN. §76-1-402(3). UNITED STATES CONST. AMEND. V; UTAH CONST. ART. I, § 12; McCovey at 1235.

## V. THE TRIAL COURT ERR IN FAILING TO RECUSE JUDGE ANDERSON BASED ON A VIOLATION OF DEFENDANT'S RIGHT TO FILE PLEADINGS

UT. R. CIV. P. 10 (2002) sets forth the rule pertaining to the form of pleadings and other papers to be filed with the courts in the State of Utah, and specifically states as follows

> (f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, **the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers.** The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(Emphasis added). With respect to this subparagraph (f), the Advisory Committee Notes to Rule 10 indicate that "[t]he changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule. . ."

On October 19, 2004, Schultz filed the "Disqualification Motion. R043-R052. In Wareham's supplement to the Disqualification Motion, he raised the issue that Judge Anderson had instructed his staff to throw away motions made by Wareham *pro se* and sent to the trial court. R048 at ¶5. Upon receiving the Disqualification Motion, the trial court entered its *Order*, indicating that Wareham had "showered the court with papers that may or may not be treated as pleadings" and stating that "those that bear a case number have been retained." R054-R055. The *Order* transferred the case to Judge Bryce K Bryner of the Seventh Judicial District Court with selected information from the record for determination on the Disqualification Motion. R053-R057.

On December 13, 2005, Judge Bryner entered his *Ruling on Motion to Disqualify*, addressing the issues contained in Schultz's affidavit, but failing to address separate issues raised in Wareham's supplementation to the Disqualification Motion. R073-R076. Specifically, Judge Bryner did not address the issue of whether Judge Anderson had instructed his personnel not to file pleadings sent to the trial court directly by Wareham absent a case number. *Id.*

On or about September 13, 2004, Wareham filed the Pro Se Disqualification; however, since Wareham was represented by counsel, the clerks did not file the document but instead called it to the attention of the trial court. R053. A copy of the Pro Se Disqualification does not appear in the record on appeal and was not part of the district court record. On January 10, 2005, Wareham filed a *pro se* motion for speedy resolution, which also does not appear in the record on appeal since it is not part of the district court

record. R161[8]. The absence of these pleadings from the district court record indicate that Judge Anderson possibly instructed his clerks in a manner in violation of UT. R. CIV. P. 10(f) with respect to Wareham's *pro se* filings.

Judge Anderson was clear in the *Order*, dated October 22, 2004, that those papers from Wareham which bore a case number were retained; however, this is not the intent of UT. R. CIV. P. 10(f), which clearly states that any papers for filing shall be filed even if they violate the rule by something such as not having a case number on them[9]. It is axiomatic that Rule 10(f) was created to protect an individual's due process rights to defend themselves by filing pleadings on their own behalf in their own defense. UNITED STATES CONSTITUTION, Amend. XIV; UTAH CONSTITUTION Art. I § 7.

The practice of violating Rule 10(f) necessarily creates a domino effect throughout a case. The trial court is foreclosed from presenting a complete record on appeal under UT. R. APP. P. 11(b)(1)(C) in that it failed to retain all of the original papers in this case, and under Rule 11(d)(1) in that it cannot present all of the papers for the criminal case. These omissions from the record are prejudicial to Wareham in that he is precluded from arguing any issues he raised throughout these proceedings in the appeal.

The trial court violated Wareham's Due Process rights by repeatedly violating Ut. R. Civ. P. 10(f). Judge Anderson should have recused himself from the case upon the

---

[8] Wareham raises the fact that his speedy resolution motion has been ignored by the trial court in his motion for a new trial, dated May 3, 2005, which is the cite relied upon here.

[9] UT. R. CIV. P. 10(a) states "[a]ll pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, **the file number**, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned." (Emphasis added).

filing of the Disqualification Motion raising the issue. However, he chose to forward the case to Judge Bryner for determination instead. Judge Bryner should have then addressed the issue and entered an order recusing Judge Anderson from this matter.

Since the trial has concluded and the Judgment has been entered in this matter, Wareham's only recourse for Judge Bryner's failure to address the issue in his *Ruling on Motion to Disqualify* is either a reversal of the Judgment and remand for determination of the issue or a determination of the issue by this Court.

## CONCLUSION

Wherefore, based upon the foregoing, Wareham respectfully requests that this Court overturn the Judgment and enter other such orders as this Court deems appropriate.

DATED THIS _____ day of _____, 2005.

_____
Autumn Fitzgerald
Attorney for Gregory Shane Wareham

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of _____, 2005, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

J. Frederic Voros, Jr.
Assistant Attorney General
160 East 300 South 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

_____

# Addendum ~A~

*Amended Judgement and Order of Commitment to Utah State Prison*, dated April 25, 2005

SEVENTH DISTRICT COURT
San Juan County

FILED APR 25 2005

CLERK OF THE COURT
BY _____ DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

| | |
|---|---|
| STATE OF UTAH,<br><br>Plaintiff,<br><br>vs.<br><br>GREGORY SHANE WAREHAM<br>09/22/1963,<br><br>Defendant. | **AMENDED JUDGEMENT AND ORDER OF COMMITMENT TO UTAH STATE PRISON**<br><br>Case No. 0417-49 |

APRIL 14, 2005

HONORABLE LYLE R. ANDERSON

Plaintiff Attorney: Craig C. Halls

Defendant Attorney: William L. Benge

DEFENDANT, GREGORY SHANE WAREHAM, having been adjudged guilty of the following offenses:

COUNT 1: AGGRAVATED KIDNAPPING, a First Degree Felony; COUNT 4: DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, a Third Degree Felony; COUNT 5: CRIMINAL MISCHIEF, a Class B Misdemeanor, COUNT 6: ASSAULT, a Class B Misdemeanor; COUNT 7: INTOXICATION, a Class C Misdemeanor and COUNT 8: OPEN CONTAINER IN VEHICLE, a Class C Misdemeanor; and no legal reason having been shown why judgment of this Court should not be pronounced, it is the judgment of this Court as follows:

That the defendant be imprisoned in the UTAH STATE PRISON for a term of TEN (10) YEARS to LIFE on Count 1, not more than FIVE (5) YEARS on Count 4, up to SIX (6) MONTHS each in the Utah State Prison on Counts 5 and 6, and NINETY (90) DAYS each in the Utah State Prison on Counts 7 and 8, to be served concurrently. Defendant will receive credit for time served after the completion of the Grand County Sentence.

The Court believes there is convincing evidence that the acts of Mr. Wareham may have resulted in a murder had the police not arrived to intervene. The Court asks the Board of Pardons to give serious weight to the safety concerns of the victim, Jennifer Malaska, and other members of the public before granting the privilege of parole.

The Court also orders that the 3 counts of contempt of court be purged and that the defendant serve no additional time for these charges.

It is further ordered that the remaining counts of the Information be dismissed.

The defendant, GREGORY SHANE WAREHAM, is hereby remanded to the custody of the San Juan County Sheriff or other proper officer to be transported to the Utah State Prison.

DATED this 20th day of April, 2005.

Lyle R. Anderson
District Court Judge

Craig C. Halls
San Juan County Attorney

STATE OF UTAH SEVENTH DISTRICT COURT

**CERTIFICATE OF MAILING/HAND DELIVERY**

I HEREBY CERTIFY that on the 25th day of April, 2005, I mailed, postage prepaid, or hand delivered a true copy of the above JUDGEMENT AND ORDER OF COMMITMENT TO UTAH STATE PRISON to William L. Benge, Attorney for Defendant at 712 Judge Building, 8 East Broadway, Salt Lake City, UT 84111, Adult Probation and Parole at 1165 S. Highway 191, Suite #3, Moab, UT 84532 and to the Department of Corrections, PO Box 250, Draper, UT 84020.

Joni Richardson

Clerk

# Addendum ~B~

*Jury Instruction No. 6*

JURY INSTRUCTION NO. 6

A defendant is presumed innocent until proven guilty beyond a reasonable doubt. This presumption follows the defendant throughout the trial. If a defendant's guilt is not shown beyond a reasonable doubt, the defendant should be acquitted.

The state must eliminate (or obviate) all reasonable doubt. Proof beyond a reasonable doubt is not proof to an absolute certainty. Reasonable doubt is a doubt based on reason, which is reasonable in view of all the evidence. Reasonable doubt is not a doubt based on fancy, imagination, or wholly speculative possibility. Proof beyond a reasonable doubt is enough proof to satisfy the mind, or convince the understanding of those bound to act conscientiously, and enough to eliminate reasonable doubt. A reasonable doubt is a doubt that reasonable people would entertain based upon the evidence in the case.

# Addendum ~C~

Disqualification Motion, dated October 19, 2005

**William L. Schultz, #3626**
**Attorney at Law**
**69 East Center**
**P.O. Box 937**
**Moab, UT 84532**
**(435) 259-5914**
**FAX (435) 259-6194**

SEVENTH DISTRICT COURT
San Juan County

FILED OCT 19 2004

CLERK OF THE COURT
BY _____
DEPUTY

**IN THE SEVENTH DISTRICT JUDICIAL COURT**

**IN AND FOR SAN JUAN COUNTY, STATE OF UTAH**

| | |
|---|---|
| **THE STATE OF UTAH,**<br>**Plaintiff,**<br><br>**vs.**<br><br>**GREGORY SHANE WAREHAM,**<br>**Defendant.** | **MOTION TO DISQUALIFY**<br><br><br><br>**CASE NO.** 041-49 ~~031765~~<br>**Judge Lyle R. Anderson** |

COMES NOW the Defendant, hereto, by and through his attorney of record, William L. Schultz, and herewith files his motion to disqualify Judge Lyle R. Anderson from further participation in this proceeding.

This Motion is filed pursuant to an Anders rationale and Rule 29, Utah Rules of Criminal Procedure and is supported by a certificate of good faith and affidavit herewith submitted.

DATED 18th day of October 2004.

William L. Schultz
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2004, I mailed and faxed a true and correct copy of the foregoing Motion to Disqualify, to:

Craig C. Halls
San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535

Law Office of William L. Schultz

**William L. Schultz, #3626**
**Attorney at Law**
**69 East Center**
**P.O. Box 937**
**Moab, UT 84532**
**(435) 259-5914**
**FAX (435) 259-6194**

SEVENTH DISTRICT COURT
San Juan County

FILED OCT 19 2004

CLERK OF THE COURT
BY _____
DEPUTY

**IN THE SEVENTH DISTRICT JUDICIAL COURT**

**IN AND FOR SAN JUAN COUNTY, STATE OF UTAH**

| | |
|---|---|
| **THE STATE OF UTAH,**<br>**Plaintiff,** | **AFFIDAVIT OF**<br>**WILLIAM L. SCHULTZ** |
| **vs.** | |
| **GREGORY SHANE WAREHAM,**<br>**Defendant.** | **CASE NO.** ~~**031765**~~ 041749<br>**Judge Lyle R. Anderson** |

STATE OF UTAH )
COUNTY OF San Juan ) ss.

William L. Schultz, being first duly sworn, states as follows:

1. That he is an attorney duly licensed and authorized to practice law in the State of Utah. He has submitted this Affidavit, Motion to Disqualify, and Certificate of Good Faith to his client pursuant to filing with the court. Affiant has advised his client of his rights to supplement the materials prior to his filing. This Affidavit is prepared and submitted pursuant to an Anders rationale. Affiant has attempted to present issues as bases for disqualifications and submits the following.

A. Judge Anderson has demonstrated a prejudice against Defendant and an intent to impose a harsher punishment on Defendant by an improper carryover form a prior case. After Defendant was sentenced for DUI in Grand County, Judge

Anderson asked the prosecutor why her sentencing recommendation was so lenient. Judge Anderson agreed with her comment that he "Could get Defendant on this case." Law enforcement officers and court personnel witnessed these comments.

**B.** Judge Anderson has displayed open hostility towards Defendant by yelling at him in court and by displaying open anger.

**C.** Judge Anderson has lied to the Defendant saying there is no other public defender.

**D.** Judge Anderson has refused to appoint another public defender or to allow Defendant counsel of his choice.

**E.** Judge Anderson has demonstrated a bias against Defendant by violating his own policy of suspending fines for people who are incarcerated. This occurred in case number 0317-65 in which Judge Anderson on May 17th ordered Defendant to serve 90-days in jail. Judge Anderson did not reduce Defendant's original jail term to reflect credit for fine amounts already paid by Defendant.

F. Judge Anderson has miscalculated the amount of time Defendant served in case number 0317-65, resulting in Defendant spending more time incarcerated than he was originally sentenced for. On numerous occasions Judge Anderson has refused in court to listen to Defendant's accounting of time served.

G. Judge Anderson acted in an arbitrary and capricious manner against Defendant by raising his bail in this matter without cause and without providing Defendant due process or a fair hearing. Judge Anderson originally set bail in the amount of $15,000.00 on March 26th, 2004, which amount was posted by Defendant through surety. On July 6th, 2004 Judge Anderson increased Defendant's bail to $75,000.00

without cause or hearing, resulting in Defendants incarceration.

DATED 18th day of October 2004.

William L. Schultz
Attorney for Defendant

I a Notary Public, hereby certify that on the 18th day of October 2004 personally appeared before me, William L. Schultz who first being duly sworn/affirmed, severally declared that he is the person who signed the foregoing document and that the statements therein contained are true.

Joni Richardson
~~Notary Public~~ Court clerk

My Commission expires: _____ Residing in: _____

Supplement to Rule 29 10/18/04

① I believe Jugde Mannley set the original bond at 17,500.00 And that Anderson had No idea of it. Anderson set a new bond without doing his research.

② Anderson is perposly causing a delay in my right to a speedy trial by postponing the filing of this motion. This could have been filed Sept 13 2004. Anderson did not need to wait on the pub./def. to see if he could still represent me on this matter.

③ Anderson is campaigning against me causing bias in judge Hazelton and court officers.

④ Anderson took away "Good time" awarded by jail. (Not his jurisdiction or pertaining to his judgement)

⑤ I believe Anderson has instructed his staff to throw away, motions made by me and sent to the court. (obstruction of justice)

⑥ Anderson didn't give me notification of a 7/6/04 court date. My lawyer never told me of one 7/1/04. Sept 1-2 was the next scheduled court date.

⑦ Anderson has sent a change of court date previously to my address when a rest. order prevented me from getting it. Aug 2003 #317-65 I was arrested for Andersons mistake.

⑧ My bond is higher Now and he has lowered almost all the charges against me.

Supplement Rule 29

(9) Anderson told me that the Sept 1-2 2004 court, trial date would not be changed even if I hired another Atto. He said Schultz would be ready for trial. These are both lies.

(10) Anderson refuses to give me adequate or effective counsel. MR Schultz has been told that I had posted a bond in this case since July 2004 and hasn't checked on it up to 10/14/04.

(11) Any normal person who had seen some one in court as often as Anderson has seen myself would have concluded that I was or had a problem.

I G.S. Wapeham do testify that these are truthful and factual as to the best of my knowledge.

10/18/04 Shane Wapeham

788 San Juan Co Jail
Monticello Ut. 84535

**William L. Schultz, #3626**
**Attorney at Law**
**69 East Center**
**P.O. Box 937**
**Moab, UT 84532**
**(435) 259-5914**
**FAX (435) 259-6194**

SEVENTH DISTRICT COURT
San Juan County

FILED OCT 19 2004

CLERK OF THE COURT
BY _____
DEPUTY

**IN THE SEVENTH DISTRICT JUDICIAL COURT**

**IN AND FOR SAN JUAN COUNTY, STATE OF UTAH**

| | | |
|---|---|---|
| **THE STATE OF UTAH,** | : | **CERTIFICATE OF** |
| **Plaintiff,** | : | **GOOD FAITH** |
| **vs.** | : | |
| **GREGORY SHANE WAREHAM,** | : | **CASE NO. ~~0317-65~~ 0417-49** |
| **Defendant.** | : | **Judge Lyle R. Anderson** |

In accordance with Rule 29, Utah Rules of Criminal Procedure I certify this Motion to Disqualify is filed in good faith and is supported by an affidavit to show bias or prejudice or conflict of interest.

This certificate is filed pursuant to an Anders rationale.

DATED 18 day of October 2004.

William L. Schultz
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2004, I mailed and faxed a true and correct copy of the foregoing Certificate of Good Faith, to:

Craig C. Halls
San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535

Law Office of William L. Schultz

# Addendum ~D~

*Ruling on Motion to Disqualify*,
dated December 16, 2005

SEVENTH DISTRICT COURT
San Juan County

FILED DEC 16 2004

CLERK OF THE COURT
DEPUTY

**IN THE SEVENTH DISTRICT COURT IN AND FOR SAN JUAN COUNTY, STATE OF UTAH**

| | | |
|---|---|---|
| **STATE OF UTAH,** | ) | **RULING ON MOTION TO DISQUALIFY** |
| Plaintiff, | ) | |
| VS. | ) | |
| **GREGORY SHANE WAREHAM,** | ) | Case No. 0417-49 |
| Defendant. | ) | Judge Bryce K. Bryner |

The defendant filed a *Motion to Disqualify* supported by an *Affidavit* and a *Certificate of Good Faith* on October 19, 2004, requesting that Judge Lyle R. Anderson be disqualified from further participation in this case. On October 22, 2004, Judge Anderson entered an Order referring the motion and the affidavit to the undersigned judge to rule on the sufficiency of the affidavit pursuant to the provisions of Rule 29, Utah Rules of Criminal Procedure. Copies of additional hand-written pleading from the defendant, two video tapes of proceedings on August 2nd and August 16th, 2004, and a copy of all sentencing orders in case 0317-65 and copies of docket sheets were also transmitted to the undersigned judge for consideration. The undersigned judge has reviewed the Motion to Disqualify and supporting documents and the videotapes and now issues this ruling.

The Affidavit of William L. Schultz, who is defendant's court-appointed counsel, alleges that Judge Anderson has demonstrated a bias or prejudice against defendant and recites seven specific instances which are addressed by the court:

A. The defendant asserts that Judge Anderson, after sentencing the defendant on a DUI case, asked the prosecutor why her sentencing recommendation was so lenient, and that Judge Anderson agreed with the prosecutor's comment that he "could get defendant on this case." The defendant's affidavit also implies that the comments by the prosecutor and Judge were not made

on the record because "law enforcement officers and court personnel witnessed these comments." The court assumes that had the statements been made on the record the defendant would have so stated instead of claiming that the statements were witnessed by law enforcement officers and court personnel.

It is significant that the defendant alleges that the prosecutor made the remark that Judge Anderson "could get the Defendant on this case." It is not alleged that Judge Anderson made the remark. Instead, the defendant claims that the judge "agreed" with the prosecutor's comment. The defendant does not state the language used by the judge but only characterizes the judges's response as "agreeing" with the prosecutor. Absent a record of the actual language used by the judge and absent any other evidence of actual bias in the record, the defendant's affidavit is insufficient to prove actual bias.

B. The defendant claims the judge has displayed open hostility toward him by yelling at him in court and displaying open anger. However, the defendant does not give any dates on which the conduct is alleged to have occurred.

The undersigned judge has reviewed the video recordings of the proceedings before Judge Anderson on August 2, 2004, and August 16, 2004, and cannot find anything in the proceedings that approaches open hostility or displaying open anger. To the contrary, the judge was extremely patient with the defendant in both hearings and politely answered the defendant's questions regarding appointment of the public defender, establishing a trial date, and alleged deficiencies of his counsel. Never once did the judge raise his voice, become impatient, or display any anger or hostility toward the defendant.

C. The defendant claims Judge Anderson lied to him by stating that there is no other public defender. However, the defendant has not met the burden of proving that there is another public defender for San Juan County. Moreover, in reviewing the videotape of the proceedings before Judge Anderson on August 2, 2004, the undersigned judge finds that the judge did state that there was no other public defender in San Juan County but qualified his statement by stating that he

would not appoint other counsel unless his present public defender was not performing to the standard required by law. The judge, after a lengthy dialogue with the defendant, concluded that the defendant had not persuaded him that his present counsel was performing below the requisite standard. Accordingly, the court cannot find that Judge Anderson lied to the defendant.

D. The defendant claims Judge Anderson has refused to appoint another public defender or to allow the defendant counsel of his choice. In reviewing the proceedings of August 2nd and 16th of 2004, the court finds that the judge did refuse to appoint another public defender but only after having found that the defendant had not shown sufficient grounds to remove the present public defender and appoint other counsel. This ruling does not show bias or prejudice but only reflects the current state of the law with regard to appointment of public defenders.

After reviewing the proceedings of August 2nd and 16th of 2004, the court cannot find that the court denied the defendant counsel of his choice. It is true that the judge did not allow the defendant to have a court appointed attorney of his choice, but the judge did not restrict or disallow the defendant from employing counsel of his own choice. In fact, the judge encouraged the defendant to employ counsel of his own choice if he had the financial ability. The position of the court on this issue does not reflect bias or prejudice.

E. The defendant claims that Judge Anderson violated his own policy of suspending fines for people who are incarcerated and thereby demonstrated bias against the defendant. The court finds that the defendant has not established that there is such a policy, and even f there were such a policy, the judge has the authority to impose or suspend jail time and fines as he deems appropriate to each individual case, provided the sentence or fine does not exceed the time or amounts provided by statute. To impose or suspend fines or jail time is the very essence of judging, and the defendant has not demonstrated that the judge's refusal to reduce jail time to reflect credit for fine amounts already paid resulted from bias or prejudice.

F. The defendant asserts that Judge Anderson miscalculated the amount of time the defendant served in case number 0317-65, resulting in the defendant serving more time than he

was originally sentence for. If the judge miscalculated the time served, the remedy for the defendant is to file an appeal. In the alternative, the videotape of the proceedings on August 16, 2004, reflect that the defendant was present in court with his counsel when he raised the issue of time served. After listening to the statement of the defendant the judge suggested to the defendant and his counsel that they review the record to establish the amount of time served. It is no correct to state that Judge Anderson refused to listen to the defendant's accounting of time served.

G. The defendant claims Judge Anderson acted in an arbitrary and capricious manner by raising the defendant's bail without cause and without providing the defendant din this case was originally set in the amount of $15,000.00 which the defendant posted on April 19, 2004. The case history further shows that the court issued a warrant for the defendant's arrest on April 19, 2004, when the defendant failed to appear for a hearing, and the court established bail in the amount of $75,000.00. The record clearly shows that the bail was set in the amount of $75,000.00 by reason of the defendant's failure to appear for his hearing on April 19, 2004. The defendant's claim that bail was raised from $15,000.00 to $75,000.00 without cause is without merit inasmuch as the defendant failed to appear for a hearing when charged with Aggravated Kidnapping and Aggravated Burglary, each First Degree Felonies, as well as 7 misdemeanors.

After making the above findings, the court concludes that the affidavit of the defendant has not demonstrated actual bias, prejudice, or abuse of discretion. Judge Anderson is directed to continue to hear all matters in this case.

DATED this 11th day of December, 2004.

Bryce K. Bryner, Judge